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No. 72

In the Supreme Court of the United States

OCTOBER TERM, 196

JOHN VAN ALLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 970

JOHN VAN ALLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court's memorandum opinion (P.A. 8a–10a)[1] is not reported. The opinion of the court of appeals (Pet. 1a–3a) is reported at 288 F. 2d 825.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1961 (Pet. 4a–5a). A petition for rehearing was denied on April 18, 1961 (Pet. 9a). The petition for a writ of certiorari was filed on May 16, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "P.A." refers to the petitioner's (there, appellant's) appendix in the court of appeals; "G.A.", to the government's appendix.

QUESTION PRESENTED

Whether petitioner waived his right to a speedy trial under the Sixth Amendment by failing to request an earlier trial or to resist any postponement of trial.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States:

Sixth Amendment.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *.

STATEMENT

Petitioner was indicted on March 13, 1953, for wilfully attempting to evade income taxes by filing a false and fraudulent return for the year 1946. The return as filed showed net income of $49,862 and a tax due of $24,010; the indictment charged an understatement of income by $76,145 and of tax by $59,895 (P.A. 1a, 6a, 7a). After a trial to the court,[2] petitioner was found

[2] The understatement of income was not contested at the trial (see Pet. 3) and consisted primarily of the omission of short-term capital gains from sales of 76,000 shares of Beaulieu Yellowknife Mines, Ltd., stock. The shares were first transferred from an account petitioner maintained with a Toronto, Canada, broker into three other accounts: an account maintained in Montreal in the name of a nominee; an undetermined third-party account in Toronto; and an account with another broker in Toronto in petitioner's own name. The stock was then sold from those accounts (G.A. 112a–124a, 134a–135a, 174a–176a).

The defense was that the omissions were not wilful but resulted from an error by one Kubik, an acquaintance of petitioner's who prepared worksheets from the data given him by petitioner and then, from the worksheets, furnished petitioner's

guilty and was sentenced to imprisonment for a year and a day (P.A. 11a–12a). The court of appeals affirmed (Pet. 1a–3a).

The chronology of events on which petitioner's claim of a denial of a speedy trial is based is as follows (P.A. 1a–6a; G.A. 5a, 11a):

> March, 1947: 1946 return filed.
> March 13, 1953: Indictment returned.
> March 3, 1954: Case marked "off calendar."
> September 10, 1959: Case restored to calendar.
> February 19, 1960: Motion to dismiss for failure to prosecute denied.
> September 1, 1960: Trial commenced.

In denying the motion to dismiss for failure to prosecute, the district court stated (P.A. 9a):

> Upon oral argument of the instant motion, counsel for the defendant admitted that no effort of any kind had been made by the defendant prior to the date this motion was filed to expedite bringing his case to trial. The "marking off" was done with the full knowledge, and undoubtedly acquiescence, of the defendant with the information that was to go on the return.

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accountant with the (whose identity petitioner had concealed from the revenue agents until the eve of the indictment, G.A. 103a–107a, 110a–111a) testified that, being unable to trace the final disposition of the 76,000 shares delivered out of the original records given him by petitioner, he had asked petitioner about the transaction and had been told that it was uncompleted and should be left out of the return (G.A. 29a–54a, 66a–67a, 70a, 72a–79a). Despite vigorous cross-examination based on an inconsistent statement made when he was first questioned by investigators, and before he had an opportunity to examine his worksheets, the witness adhered to his testimony (P.A. 32a–56a, 63a–68a; G.A. 63a–67a, 70a, 72a) and it was evidently accepted by the trial judge.

> fendant, and there is no suggestion that at any time during the pendency of this action the defendant was unaware of the status of his case or unable to make the necessary expediting motions. * * *

The court concluded that petitioner, by his inaction and acquiescence, had waived any right to object to the delay as violating his rights to a speedy trial under the Sixth Amendment. Additionally, the court found that no showing of prejudice had been made to justify a discretionary dismissal of the indictment under Rule 48(b) of the Federal Rules of Criminal Procedure.

ARGUMENT

It is settled law that a defendant, competent to do so, who takes no action to precipitate trial or to resist postponement thereby waives any objection to the delay and may not thereafter upset a conviction on the ground that he was denied a speedy trial.[3] As

[3] *E.g.*, *United States* v. *Lustman*, 258 F. 2d 475 (C.A. 2), certiorari denied, 358 U.S. 880; *United States* v. *Kaye*, 251 F. 2d 87 (C.A. 2), certiorari denied, 356 U.S. 919; *Pietch* v. *United States*, 110 F. 2d 817 (C.A. 10), certiorari denied, 310 U.S. 648; *Worthington* v. *United States*, 1 F. 2d 154 (C.A. 7), certiorari denied, 266 U.S. 626; *Collins* v. *United States*, 157 F. 2d 409 (C.A. 9); *Bayless* v. *United States*, 147 F. 2d 169 (C.A. 8), reversed on other grounds, 150 F. 2d 236 (C.A.

explained by the district court, "To allow a defendant knowingly to sit on his rights and acquiesce in postponements of his trial, and then assert that delay as a ground for dismissal, would be tantamount to allowing him to turn a shield for his protection into a powerful sword" (P.A. 9a). The purpose of the privilege given by the Sixth Amendment is to enable an accused to secure an early trial, not to permit him to avoid trial altogether by sitting silent and later objecting to the delay. Delay benefits the defense as often as the prosecution, and a defendant who acquiesces in postponement presumably is willing to risk the possible disadvantages of delay for the possible benefits. There is no reason to relieve him of the consequences of that choice.

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8); *United States* v. *Research Foundation, Inc.*, 155 F. Supp. 650 (S.D. N.Y.); *Petition of Provoo*, 17 F.R.D. 183, 198 (D. Md.), affirmed, 350 U.S. 857. Most state courts have adopted the same view under similar provisions of state law. See Note, *The Right to a Speedy Criminal Trial*, 57 Col. L. Rev. 846, 853.

The views expressed by the district court in *United States* v. *Dillon*, 183 F. Supp. 541 (S.D. N.Y.), relied on by petitioner (Pet. 15, 19), have, of course, been rejected by the Second Circuit, not only in the *Lustman* and *Kaye* cases, *supra*, but in this very case.

There is no conflict of decisions[1] or other reason for review by this Court. The petition for certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
JOSEPH M. HOWARD,
LLOYD J. KENO,
Attorneys.

JUNE 1961.

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[1] The question whether even a defendant who objects to a delay must show that he was prejudiced by it in order to upset a conviction—on which petitioner asserts there is a conflict (Pet. 10-11)—is not involved in this case, since the sole basis of the decisions below was that petitioner had waived any objection to the delay. Indeed, since the Second Circuit admittedly (Pet. 11) takes the view that, in such circumstances, a showing of prejudice is *not* required—*i.e.*, the view on that question most *favorable* to him—petitioner could not in any event urge a conflict with other circuits on that issue as a reason for the writ.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. [redacted] 92

JOHN VAN ALLEN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

JESSE CLIMENKO,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

JOHN VAN ALLEN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

No. 970

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

Petitioner respectfully moves for leave to file the annexed Petition for Rehearing of the order of this Court entered October 9, 1961, denying the petition for Writ of Certiorari in this case, Mr. Justice Douglas voting for the granting thereof.

Rehearing is sought at this time because, as is pointed out more fully in the annexed Petition

(1) the conflict continues to exist among the lower courts with respect to (a) the burden of showing "prejudice" from the government's failure to record a defendant's extrajudicial statement at trial, and (b) the effect of such a defendant's failure to move for a speedy trial upon his constitutional right thereto, and his right to assert it later in attacking his conviction

and

(2) petitioner is about to be deprived of his liberty on the evidence of a single witness that, some thirteen

years before the trial, petitioner had instructed him, orally, to omit certain transactions from petitioner's tax return, of which alleged instruction the witness admitted at the trial that (a) he had no independent recollection and (b) he had informed four different persons, on three separate occasions, some seven years previously, that petitioner had not given him any such instruction, and (c) as to which, when asked at the trial if he had testified truly to it, he answered: "No, I could have been mistaken".

It is respectfully submitted that the resolution of these conflicts, and the protection of the rights of the petitioner herein, call for a review by this Court.

October 23, 1961

JESSE CLIMENKO
Counsel for Petitioner

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays (1) that this Court grant rehearing of its order of October 9, 1961, denying the petition for Writ of Certiorari, Mr. Justice Douglas voting to grant the writ, and (2) that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above-entitled case, as prayed for in the petition filed herein May 16, 1961.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

As we pointed out in the Petition for a Writ of Certiorari herein (p. 3), there was a lapse of upwards of thirteen years between the date of the offense and the date of trial.

The reasons assigned in the Petition in support of the granting of the Writ were (1) the conflict which exists among United States courts as to (a) whether or not it is incumbent on a defendant in a criminal case to show "prejudice" from the government's failure to accord him a speedy trial, and (b) whether or not such a defendant, by failing to move for an early trial, waives his constitutional right thereto and the right to assert it later in attacking his conviction (Petition, pp. 10-19), and (2) the unusual and extraordinary circumstances with respect to the testimony of the single witness upon whose evidence petitioner was convicted (id. pp. 3-9, 13).

The conflict among the courts of the United States, referred to above, continues apace; indeed, there is even a conflict between judges of the same court.

In *U. S. v. Kabot*, 185 Fed. Supp. 159 (U. S. D. C., S. D. N. Y.), District Judge Metzner held that the right to

a speedy trial is deemed waived if not promptly asserted, i.e. (p. 160):

> "In short, the defendant here must be held to have acquiesced in the delay by not taking prompt affirmative action in his own behalf to preserve his rights."

Judge Weinfeld, in the same Court, holds the contrary. Thus, in *U. S. v. Brown*, 188 Fed. Supp. 624, Judge Weinfeld said (p. 626):

> "The defendant, however, raises an issue of substance based upon a thirty-month delay from his arraignment on a complaint before a United States Commissioner until his indictment. The United States Attorney contends that the thirty-month delay is not per se ground for dismissal of the indictment, and further that the defendant, by failure to move to dismiss the complaint because of delay in presenting the matter to a grand jury, has, in effect, waived his right to a dismissal of the indictment on the ground that he has been denied a speedy trial under the sixth amendment. While there is respectable authority to support this position, this Court is not prepared to accept its implication that a constitutional right may be forfeited by inaction rather than by affirmative and intentional waiver or relinquishment. The constant rule adhered to by the Supreme Court requires that courts must 'indulge every reasonable presumption against waiver of fundamental constitutional rights.'"

In support of Judge Weinfeld's statement that there is "respectable authority" to support the contention of the United States attorney that defendant's failure to move to dismiss resulted in a waiver of his right to do so, Judge Weinfeld cited *U. S. v. Fassoulis*, 179 Fed. Supp. 645 (D. C. S. D. N. Y., 1959) and *U. S. v. Lustman*, 258 Fed. 2d 475 (2 Cir.) cert. den., 358 U. S. 880. On the other

hand, in support of his refusal to accept the implication of the aforesaid cases that a constitutional right may be forfeited by inaction, Judge Weinfeld cited *U. S.* v. *Dillon*, 183 Fed. Supp. 541; *Von Moltke* v. *Gillies*, 332 U. S. 708; *Glasser* v. *U. S.*, 315 U. S. 60; *Johnson* v. *Zerbst*, 304 U. S. 458; *People* v. *Prosser*, 309 N. Y. 353.

The United States Court of Appeals for the Second Circuit, as late as March 9, 1961, in *U. S. ex rel Buono*, 287 F. 2d, 534, 536, reasserted the rule of *Lustman*. Contriwise, in *U. S. ex rel Pierce*, 193 Fed. Supp. 395, the United States District Court for the Northern District of Indiana, noting (p. 399) the "well established" rule that the waiver of a constitutional right "is not to be lightly inferred," and that "Every reasonable presumption should and is indulged against a waiver of fundamental rights," held (p. 400) on the authority of *U. S.* v. *Dillon*, 183 Fed. Supp. 541, and *Petition of Provoo*, 17 F. R. D. 183, that the passage of time between the original conviction of petitioners and their second retrial constituted "an unreasonable delay," by which defendants were "prejudiced", and were "deprived of their constitutional right to both a speedy and fair trial".

In *U. S. ex rel Giovengo*, 194 Fed. Supp. 154 (March 27, 1961). District Judge McIlvaine, in the United States District Court, W. D. Pennsylvania, stated that the deferring of sentence for almost three years after entry of a plea of guilty in a state court was a violation of defendant's right of due process under the Fourteenth Amendment and (p. 157)

> "If this case with this delay had happened in the federal system, there is no question but what a constitutional right would have been violated."

Thus, the conflict among the lower courts continues.

We feel that on the application for the Writ, we did not adequately present the following facts:

Petitioner was convicted solely on the testimony of the Government's witness, Kubik, who had been retained by petitioner to prepare petitioner's income tax return for 1946, and to whom petitioner had turned over his books and records for that purpose (P. A. 15a, 17a).

Kubik testified that in making up his work sheets from the data so furnished to him by petitioner, Kubik inquired of petitioner—this was some 13 years before the trial—as to how to treat certain transactions reflected in the data petitioner had given him, and that petitioner had instructed him to omit them from the return (Id. 23a).

There is no other testimony connecting petitioner with the omissions for which he was convicted.

Kubik testified further that, after working on the matter, he suggested to petitioner that it be turned over to an accountant to complete, and this was done. Kubik thereupon delivered all petitioner's data to the accountant, and Kubik testified that if the accountant had properly checked it, the return would have been in proper form (P. A. 34a, 56a). However, because of the shortness of time, the accountant did not make an independent review of petitioner's data; instead, he merely had Kubik read off to him, from Kubik's worksheets, the figures which Kubid said were to be entered into the return, and the accountant so entered them (P. A. 29a, 30a, 33a-34a, 59a, 68a, 70a, 71a, 81a, 91a, 94a-95a; G. A. 55a, 56a, 58a, 83a-84a).

Kubik admitted that he had no independent recollection of petitioner's having told him to omit any transactions from petitioner's return; on the contrary, he admitted that in testifying that the omissions were based on petitioner's instructions he was merely stating an inference he drew from the fact that in examining his original worksheets [which he had not seen between the time he prepared them

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(Id. 45a, 64a, did Kubik admit that on three separate occa
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No. I could have been mistaken."
"A. *No*
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Such is the his liberty.
deprived of his

CONCLUSION

asons set forth above and in the Petition for a
For the reasiorari, it is respectfully urged that rehearing
Writ of Certiand that upon rehearing a Writ of Certiorari
be granted, anCourt of Appeals for the Second Circuit
is ue to the Cou

October 23, 1961

New York, Oct

Respectfully submitted,

JESSE CLIMENKO
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

JESSE CLIMENKO
Counsel for Petitioner